IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 4023 OF 2004

Shri Anil Umrao Gote ... Applicant

versus

The State of Maharashtra ... Respondent

...

Mr. A.P. Mundargi with Mr. Niranjan Mundargi, for the Applicant.

Mr. V.T. Tulpule, for the Respondent.

...

CORAM : A.M.KHANWILKAR,J.

29th September 2004

ORAL ORDER :

1. This application is filed under "section 482" of the Code of Criminal Procedure by the Applicant, who is accused No. 45 in CR. No. 135/2002 registered at Bund Garden Police Station, Pune, pertaining to the commonly known "Stamp Scam case". The relief claimed in this application is that the Applicant be released on temporary bail or interim bail for the purpose of

submitting his nomination form in accordance with the Notification dated 15th September 2004 issued by the Election Commission of India in respect of Assembly elections. When this application was taken up for hearing on 21st September 2004, Counsel for the Applicant, on instructions, stated that the Applicant was not interested in pursuing the present application. However, as objection was taken by the learned P.P. regarding entertaining such applications either for "interim bail" or "temporary bail" and the said question being recurring one, it was thought appropriate that the issue is finally answered. Accordingly, Counsel were called upon to address the Court on the question as to whether it is open to the Special Court, or, for that matter, the High Court, to release any accused named in the offence under the special enactment of the Maharashtra Control of Organised Crime Act, 1999 (hereinafter referred to as MCOCA, for the sake of brevity) on "interim bail" or "temporary bail", as the case may be.

2. According to the Counsel for the Applicant, the power to grant bail is derived by

the Special Judge under section 437 of the Code of Criminal Procedure, whereas by the High Court under section 439 of the Code. It is argued by Mr. Mundargi that since there is power to grant bail, it gives implicit power to the Court to release any person on interim bail, until the final decision of the main bail application, or, for that matter, to release the accused on temporary bail in certain special circumstances. Mr. Mundargi contends that such power is not taken away by the special enactment nor it be limited, as it is inherent in the Court which is empowered to release the accused on bail during the pendency of the trial. He further submits that there is no necessity for the Court to record a finding as required by section 21(4) of the Act while enlarging the concerned accused on interim or temporary bail. To buttress the above submissions, Mr. Mundargi has placed reliance on the decision of Division Bench of Allahabad High Court reported in 1993 Cri.L.J. 3574 in the case of Haji Peer Bux and others v. State of U.P. and others. Reliance is also placed on the Bombay High Court Appellate Side Rules, which deal with the Criminal Business to be conducted

by the Single Judge and Division Bench, which refers to grant of temporary bail in the matter pending before the concerned Court. Reliance is also placed on the observations of the Apex Court in the case of Usmanbhai Dawoodbhai Memon and others v. State of Gujarat, reported in (1988) 2 S.C.C. 271, as well as in the case of Kartar Singh v. State of Punjab, reported in (1994) 3 S.C.C. 569. He has also relied upon couple of impugned orders of this Court releasing the accused under the MCOCA on temporary bail to buttress his arguments. He, however, fairly accepts that in none of those matters the question posed in this case has been raised or answered. According to Mr. Mundargi, there is no inhibition for grant of interim bail or temporary bail either by the Special Judge or by the High Court even if the offence is one under the special enactment, such as the MCOCA.

3. On the other hand, Mr. Tulpule, learned P.P., submits that the power to grant bail has been limited by the special enactment, in particular section 21 of the MCOCA. According to Mr. Tulpule, "complete fetter" has been imposed

by the Legislature on granting bail to any accused involved in the commission of offence under the special Act; and so long as conditions specified in section 21 of the Act are not fulfilled, the Court cannot assume jurisdiction to release the accused on bail. Mr. Tulpule submits that there can be variety of situations, where the accused involved in the commission of the offence under the special Act will approach the Special Judge, or, for that matter, this Court. Invariably, accused would approach the Special Judge, or, the High Court, requesting to be released on interim bail or temporary bail on the assertion of serious illness and for undergoing medical treatment or to attend last rites of deceased close relative and so on. The learned Public Prosecutor contends that even in such cases, there is no question of grant of interim bail or temporary bail as the Court cannot assume such power, either in exercise of power under section 437 or 439, as the case may be, unless requirements of section 21 of the Act are fulfilled. He submits that there is total bar on the grant of bail on any ground, without fulfilling the specified conditions under section

21 of the Act. Reliance is placed by Mr. Tulpule also on the decisions of the Apex Court in JT 1993 (6) SC 589, State of Maharashtra v. Abul Hamid, particularly paras 8 and 13, as well as another decision reported in JT 1994 (2) SC 1, State of Maharashtra v. Abdul Hamid and unreported decision of our High Court in the case of Intelligence Officer, Narcotics Control Bureau, Mumbai v. Ramnik J. Gajaria, Criminal Writ Petition No. 3605 of 2001 dated November 29, 2001. In this case, the accused was released on bail by the lower Court and to justify that order, it was inter alia contended that the accused was suffering from serious illness for which he was required to undergo medical treatment. While dealing with the said argument, in para 22, relying upon the decision of the Apex Court in the case of Lakshmi and ors. v. State of U.P., this Court rejected that contention and observed that in such a case, necessary medical facility can be provided by the jail authorities.

4. After considering the rival submissions, I have no hesitation in taking the view that having regard to the plenitude of the provision

contained in the special enactment, the Court, whether the Special Judge or the High Court, can release the accused involved in the commission of offence under the special enactment on interim bail or temporary bail, as the case may be, only if the requirements of section 21 of the Act, in particular sub-section (4) thereof, are fulfilled. In the first place, it is well established principle that it is not open to invoke inherent powers of the Court under section 482 of the Code while considering the prayer for bail, much less interim or temporary bail. For, it is well-settled that when there is specific provision for grant of bail, it is not open to the High Court to exercise powers under section 482 of the Code, but the Court would be obliged to decide the matter within the parameters of the provisions for bail, such as section 439 of the Code. This position is restated by the Apex Court in the recent case reported in 2003 (8) S.C.C. 50 in State of Gujarat v. Salimbhai Abdulgaffar Shaikh and others. Para 16 of the said decision reads thus :

" The High Court has also invoked powers

> under Section 482 CrPC while granting bail to the respondents. Section 482 CrPC saves the inherent power of the High Court. The High Court possesses the inherent powers to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist. The power has to be exercised to prevent abuse of the process of the court or to otherwise secure the ends of justice. But this power cannot be resorted to if there is a specific provision in the Code for the redressal of the grievance of the aggrieved party. (See Madhu Limaye v. State of Maharashtra, (1977) 4 SCC 551). There being a specific provision for grant of bail, the High Court clearly erred in taking recourse to Section 482 CrPC while enlarging the respondents on bail."
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> (emphasis supplied)

5. So understood, the Special Judge as well as this Court will be obliged to exercise power to grant bail as is circumscribed by the parameters of section 437 and 439 of the Code read with section 21 of MCOCA. It was, therefore, argued that if the Court has power to grant bail, that would implicitly empower the Court to enlarge the accused on interim or temporary bail. This argument was advanced on the basis of exposition of the Division Bench of the Allahabad High Court in the case of Haji Peer Bux (supra). In the first place, this decision holds that power to grant interim bail or temporary bail is to be invoked only in

exceptional situations. Be that as it may, this argument, though attractive at the first blush, however, to my mind, stands answered by the principle stated by the Apex Court in the case of Usmanbhai (supra). In para 19 of the judgment, the Court has observed thus :

> " . . . It is true that the source of power of a Designated Court to grant bail is not Section 20(8) of the Act as it only places limitations on such power. This is made explicit by Section 20(9) which enacts that the limitations on granting of bail specified in Section 20(8) are 'in addition to the limitations under the Code or any other law for the time being in force'. But it does not necessarily follow that the power of a Designated Court to grant bail is relatable to Section 439 of the Code. It cannot be doubted that a Designated Court is 'a court other than the High Court or the Court of Session' within the meaning of Section 437 of the Code. <u>The exercise of the power to grant bail by a Designated Court is not only subject to the limitations contained therein, but is also subject to the limitations placed by Section 20(8) of the Act.</u>"
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> (emphasis supplied)

. In para 20 of the same judgment, it is observed as follows :

> " . . . <u>It commences with a non obstante clause and in its operative part by the use of negative language prohibits the enlargement on bail of any person</u>

> accused of commission of an offence under the Act, if in custody, unless two conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application for such release and the second condition is that where there is such opposition, the court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. If either of these two conditions is not satisfied, the bar operates and the person under detention cannot be released on bail. . . ."
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> (emphasis supplied)

. In para 21, the Apex Court has adverted to the decision in Balchand Jain's case, reported in (1976) 4 SCC 572. Suffice it to observe that the principle stated by the Apex Court is that section 20(8) of the T.A.D.A. (which is analogous to section 21(4) of the MCOCA) operates as a complete bar or fetter on the Court to release the accused named in the offence under the special enactment on bail unless the conditions specified in the said sub-section were fulfilled. Before we dilate further, it will be apposite to advert to sub-sections (3), (4), (5) and (6) of section 21 of the MCOCA. The same read thus :

> "(3) Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person on an on accusation of having committed an offence punishable under this Act.
>
> (4) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond, unless --
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> (a) the Public Prosecutor has been given an opportunity to oppose the application of such release; and
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> (b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
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> (5) Notwithstanding anything contained in the Code, the accused shall not be granted bail if it is noticed by the Court that he was on bail in an offence under this Act, or under any other Act, on the date of the offence in question.
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> (6) The limitations on granting of bail specified in sub-section (4) are in addition to the limitations under the Code or any other law for the time being in force on the granting of bail."

6. Indubitably, sub-section (4) of section 21 of the MCOCA is pari materia sub-section (8) of section 20 of the TADA. Therefore, the principle expounded by the Apex Court in Usmanbhai’s case (supra) in respect of the said

provision, will apply proprio vigore while construing section 21(4) of the MCOCA. As mentioned earlier, the provision such as sub-section (4) of section 21 of MCOCA, which commences with non-obstante clause and in its operative part by the use of negative language, prohibits the enlargement on bail of any person accused of an offence punishable under the Act, if in custody, unless two conditions were satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application for such release; and the second condition is that where there is such opposition, the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. If these two conditions are not satisfied, the ban operates and the person under detention cannot be released on bail. In other words, by operation of law, there is a complete fetter or ban on grant of bail to accused involved in commission of offence under the special enactment (MCOCA) and the bar is lifted only on fulfilment of the two conditions specified in sub-section

(4) of section 21 of the Act. The abovesaid Statement of Law expounded in Usmanbhai's case (supra) is reiterated by the Apex Court in the case of Kartar Singh (supra). In the case of Kartar Singh (supra), the Apex Court has sounded a word of caution to the Courts that though liberty of a citizen must be zealously safeguarded by the Courts; nonetheless the Courts while dispensing justice in cases under the special enactment (TADA read MCOCA) should keep in mind not only the liberty of the accused but also the interest of the victim and their near and dear and above all the collective interest of the community and the safety of the society so that the public may not loose faith in the system of judicial administration and indulge in private retribution. Viewed in this perspective, there can be no basis to accept the contention that the Court, whether the Special Judge or the High Court, can release the accused involved in such offence on interim bail or temporary bail, irrespective of whether the two conditions specified in sub-section (4) of section 21 are fulfilled; and that the Court while granting such relief is not required to

record any finding about the fulfilment of those conditions. A priori, the argument that since the Court is empowered to enlarge the accused on bail would include power to release on interim bail or temporary bail though correct, does not mean that the Court can release the accused on interim bail or temporary bail even if the requirements of sub-section (4) of section 21 of the Act are not fulfilled. For, it is only on fulfilment of conditions in section 21(4) of the Act that the Court would assume jurisdiction to release the accused on bail, or, for that matter, "interim" or "temporary" bail, as the bar is lifted only on that condition.

7. In the circumstances, the argument as canvassed on behalf of the Applicant will have to be negatived, for neither the Special Judge nor the High Court can release the accused involved in commission of offence under the MCOCA on "interim bail" or "temporary bail" unless the two conditions specified in sub-section (4) of section 21 of the Act are fulfilled. Indeed, if the Court were to record such satisfaction, it may as well grant regular bail to such accused.

However, the opinion expressed earlier is the only logical conclusion that can be reached on construction of the relevant provision of the MCOCA. In other words, the abovesaid view is inescapable.

8. Accordingly, this application is dismissed.

(A.M.KHANWILKAR,J.)